THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on :13.08.2007

+ **OMP 131/2001**

M/S LLOYD INSULATIONS (INDIA) LTD. ...Petitioner

- versus -

M/S NBCC LIMITED ...Respondent.

Advocates who appeared in this case:
For the Plaintiff : Ms Neelam Rathore
For the Defendant : Mr Manoj K. Dass

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in Digest? YES

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner has filed the present objections under Section 34 of the Arbitration and Conciliation Act, 1996 in respect of the award dated 9.1.2001. The learned Arbitrator had found that the petitioner/claimant was entitled to the following amount:-

"AMOUNT DUE TO THE CLAIMANT.

(i) Rs. 1,84,059.24	Balance payment of the first contract.
(ii) Rs. 26,831.00	Refund security deposit in the first contract.
(iii)Rs 11,76,182.00	Amount of Bank guarantee.
(iv)Rs 10,000.00	Earnest Money Deposit"
Rs 13,97,072.24	

In respect of the counter claims submitted by the respondent, the learned arbitrator found the following amount due to the respondent.

"AMOUNT DUE TO THE RESPONDENT.

(i) Rs. 6,08,471/- Amount paid to the claimant on second contract.

(ii) Rs 3,76,845/- Cost of dismantling the defective work. "

As a result of which, the net award made by the learned Arbitrator was that the claimant would be entitled to recover a sum of Rs 13,97,072-Rs 9,85,316 = Rs 4,11,756/-. The respondent has accepted the award and has also made the payment of the said sum of Rs 4,11,756/- along with interest thereon as indicated as well as the future interest thereon as indicated in the award. Insofar as the respondent is concerned, the entire award stands satisfied. The petitioner/claimant, however, has challenged the award on two main grounds. The first ground taken by the petitioner/claimant is that no interest has been allowed to the petitioner although, the principal amounts have been found due to the petitioner. The second ground taken is that the respondent has been granted a claim which had not even been prayed for by the respondent in his counter claim.

2. The National Building Construction Corporation Limited (NBCC) was required to construct a 200 bed hospital at Maldives by the Government of India. In 1986 a tender was floated for the same. The petitioner responded to the same and its offer was accepted by the NBCC (respondent herein) on

26.9.1989. The acceptance of the petitioner's offer was conveyed on 26.9.1989 in respect of the work of false ceiling, venetian blinds and insulation and water proofing on the roof of the Indira Gandhi Memorial Hospital at Male, Republic of Maldives. The condition of the contract was that at the time of placing of the detailed order, the petitioner would have to furnish a performance bank guarantee at the rate of 10% of the contract value till the end of the maintenance period.

3. Under this parent contract two work orders were issued to the petitioner by the respondent. The first work order was issued on 16.3.1992 for fixing of false ceiling, venetian blinds and insulation materials at the said hospital project. This work order in itself comprises of two parts, one pertaining to supply and the other pertaining to erection. The total value of the first work order was Rs 1,17,61,822 (after rebate). The second work order was placed by the petitioner under, the same parent contract, on 29.8.1992 for the work of water proofing on the roof of the hospital with kini foam. The value of this contract was Rs 7,95,387 (after rebate). Disputes had arisen between the parties as a result of which the bank guarantee, which had been extended by the petitioner in favour of the respondent, came to be invoked by the respondent by a letter dated 27.1.1995. The invocation of the bank guarantee was challenged before the Delhi High Court and ultimately before the Supreme Court. The Supreme Court permitted the encashment of the bank guarantee and directed

that the amount of the bank guarantee be paid by the petitioner to the respondent. However, the Supreme Court further directed the disputes of the parties to be referred to arbitration in the following terms:-

> " All claims betweens the parties relating to or arising out of the contract dated 26.9.1989 read with work order dated 16.3.1992 and 29.8.1992 shall be referred to the arbitration of Mr Justice P.K. Bahri, retired Judge of Delhi High Court, as agreed between the parties. The venue of the arbitration shall be at New Delhi."

The learned arbitrator considered all the arguments advanced by the counsel for the parties and came to the conclusions noted above.

4. To crystallize the issues involved in the present petition, it would be necessary to refer to the claims submitted by the parties. The petitioner had submitted its claims in respect of the first work order dated 16.3.1992 as under:

> **"CLAIMS UNDER THE PURCHASE ORDER DATED 16.03.92**
>
> (FIXING FALSE CEILING, VENETIAN BLINDS & INSULATION MATERIAL, AND EXTRA WORK)

S .No.	Claims	Rs.
1.	Principal sum under the Purchase order as per statement of account.	1,84,059.24.
2.	Interest on Rs 1,84,059.24 from 01.04.94 till 20.04.99 @ 21 per cent per annum.	1,95,486.04
3.	Claim for the amount of the bank guarantee No. 34/92, received by the respondent illegally on 17.03.98.	11,76,182.20
4.	Interest on 11,76,182.20 from the date of payment i.e., 17.03.98 till 20.04.99.	2,67,976.19

S .No.	Claims	Rs.
5.	Amount incurred towards extension charges for the bank guarantee from 31.01.95 upto 31.03.97.	21,327.00
6.	Interest charges on the margin money (1000%) deposited with the bank from 1.2.95 till 17.03.98 (3 years & 46 days).	6,61,819.00
7.	Dues against the security deposit (Due after one year from date of completion i.e 31.01.94).	36,831.00
8.	Interest on Rs 36,831.00 from 01.02.95 till 20.04.99 @ 21 per cent per annum.	32,865.69
9.	Special damages for fraudulently encashing and receiving the bank guarantee amount including cost of the legal proceedings(excluding the arbitration proceedings).	20,00,000.00
	Total	4576546.36"

In respect of the aforesaid claims, the learned arbitrator awarded claims under S. Nos. 1,3 and 7. The issue involve in the present petition relates essentially to the claims under S. Nos. 2, 4, 5, 6 and 8. Insofar as the claim at S. No. 2 is concerned, no reason has been given by the learned arbitrator for not awarding interest on the amount of Rs 1,84,059.24 although the principal amount has been found to be due to the petitioner. In respect of the principal amount, the learned arbitrator held that admittedly, the contract was completed as per specifications provided in the contract, and no blame could be put on the claimant if lengths of blinds were somewhat inoperable, as alleged in the letter dated 20.9.1996 (R-11). Accordingly, the learned arbitrator came to the

conclusion that no amount was liable to be adjusted for rectifying any alleged defective work. The learned arbitrator also came to the conclusion that no defect was pointed out or occurred during the defect liability period and, therefore, no liability could be affixed on the claimant. Accordingly, the learned arbitrator held that a sum of Rs 1,84,059.24 was payable to the claimant by the respondent under the work order dated 16.3.1992. However, he did not award any interest in respect of this amount. In my view, the arbitrator ought to have granted interest once he found that the principal amount was due to the petitioner and that the respondent could not adjust the said amount for rectifying any alleged defective work. Consequently, the period for which the interest would be due would be from 1.4.1994 till date at the rate of 9% per annum (viz. the rate which the learned Arbitrator had fixed for future interest on the awarded amount).

5. In respect of S. No. 4, that is, the amount of interest which has been claimed on the sum of Rs 11,76,182.20, representing the value of the encashed bank guarantee, the said sum was paid by the petitioner to the respondent on 17.3.1998 during the proceedings before the Supreme Court. The learned counsel for the petitioner submitted that since this amount has also been found due and payable by the respondent to the petitioner in terms of the award, interest also should have been allowed on that amount. In response to

this, the learned counsel for the respondent referred to paragraph 31 of the award which reads as under:-

> "31. The claimant has raised claims for having interest at the rate of 21% per annum for periods it was not paid its dues and also has claimed expenses incurred for extending the Bank guarantee. The Bank guarantee was required to be extended as the respondent had genuine case for recovering the amount already paid to the claimant for defective work of the second contract. Mere fact that the Bank guarantee was given in reference to the first contract does not mean that the respondent could not have justifiably required extension of the same and later invocation of the same to recover the amount due to it in respect of defective work of the second contract. Thus I hold that the claimant is not entitled to recover any interest on any amount withheld or recover any expenses incurred for keeping the Bank guarantee alive."

The learned counsel for the respondent also submitted that there is no question of paying any interest on this amount of Rs 11.76 lakhs inasmuch as the bank guarantee was to have been kept alive till 30.01.2000. Considering the second point first, I find that the submission of the respondent is untenable. This is so because the bank guarantee was invoked in 1998 itself and, therefore, the question of keeping it alive would not survive. Insofar as the first point is concerned, I find that the learned arbitrator has misdirected himself in observing that although the bank guarantee had been given with reference to the first contract, it did not mean that the respondent could have required its extension and later invocation in order to recover the amount due in respect of the defective work under the second contract. First of all, the question of the bank guarantee no longer survives after the same has been permitted to be

encashed by the Supreme Court. It is well settled that a bank guarantee is a separate contract. The arbitrator was not adjudicating upon the question of invocation of the bank guarantee but was adjudicating upon the disputes between the parties in respect of the underlying contract. The arbitrator has found that the respondent was not entitled to retain the sum of Rs 11.76 lakhs. It awarded the amount in favour of the petitioner. Once he did so, reference to the bank guarantee was not proper. Furthermore, having found that the petitioner was entitled to the suit amount clearly meant that the respondent had retained the said amount when it was not entitled to do so. Accordingly, in my view, interest on the said amount of Rs 11,76,182/- also ought to have been awarded to the petitioner from the date of payment i.e. 17.3.1998 till the date of the award (9.1.2001). The rate of interest would be 9% per annum.

6. The learned counsel for the petitioner has given up the claim at S. No. 5 as also the claim at S. No. 6. Insofar as the interest claimed on the security deposit under Sr No. 8, I find that the petitioner would be entitled to the same. However, only at the rate of 9% per annum. The duration would be from 1.2.1995 till the date of the award i.e., 9.1.2001. The claim at S. No. 9 was not seriously agitated and, therefore, this need not be examined any further.

7. The learned counsel for the respondent submitted that no interest was granted to the respondent either in respect of the counter claim, and,

therefore, no interest should be granted to the petitioner because otherwise, that would alter the balance of adjustment made by the learned arbitrator. However, I do not find any merit in this argument because there is no such discussion in the award that the competing interest amounts have been balanced by the arbitrator insofar as the petitioner's and the respondent's claims are concerned. In any event, the respondent has not filed any objections to the award on this ground.

8. With regard to the claim under the purchase order dated 29.8.1992 the claims to the extent of Rs 3,80,396.76 had been preferred by the petitioner/claimant and counter claims, as per counter claim No.4 to the extent of Rs 23,17,690.10 was made by the respondent. The details of the counter claim No.4 are as under:-

"AMENDED CLAIM NO. 4

Rectification/replacement of waterproofing material at Emergency roof slab.

a)	Dismentalling cost of kini Faom water-proofing work for replacing with other material as per fax message 234 dated 28.8.1996 (Annexure R-20 and 21). MRF-1,34,264 or IRS 134, 264 x 2.86	3,83,995.00
	(One MRF = Rs 2.86).	
b)	Purchase applying and transportation cost of Brush Bond for applying on roof after dismentaling of Kini foam as per Annexure R-22 (IRS)	1,60,105.00
	Annexure R-23 (IRS)	3,583.00
		1,63,688.00
	Applying cost roof (Labour Charge) As per Annexure R-24 (MRF) 4,39,49.50 or IRS 4,39,49.50 x 2.86	1,25,696.00
	Transportation of Brush Bond from Tuticarn to Mali as per (Annexure R-25) = US $ 289.92 x 40	Rs 11,596.00
c)	Purchase of Terrakota Tiles as per Annexure R-26 (IRS).	2,71,700.00
	Transportation from New Delhi to Tuiticorin.	55,000,00
	Transportation from Tuticorn to Male-US $ 2865.16 or IRS x 40-00	1,14,606.00
d)	Greeding of roof slab, lavying of Tarrakota tiles as per Annexure R-28, MRF 4,00,736.85 x 2.86	Rs.11,46,107.30
	Annexure R-29, MRF 9150.80 X 2.86	Rs.00,26,171.30
	Annexure R-30, MRF 6681.95 x 2.86	Rs.29,130.40
	(a) to (d) – Total	Rs.23,17,690.10.”

9. The learned arbitrator only allowed the claims of earnest money deposited of Rs 10,000/- to the petitioner under this work order. However, insofar as the respondent is concerned, the learned arbitrator held that the work executed by the petitioner under the second work order was defective. He observed that the rain water obviously leaked through the kini foam on the very first onslaught of rains after completion of the work. The learned arbitrator also found that there was no evidence found on record which could prove that the cement concrete attributable to the Respondent could lead to such leakage. Accordingly, the learned arbitrator held that the respondent was entitled to recover a sum of Rs 3,76,845/- incurred for dismantling the defective work. The learned arbitrator also held that the respondent was entitled to recover the amount paid to the claimant for such defective work carried out by the claimant. The amount already paid by the respondent to the claimant was to the extent of Rs 6,08,471/-. The learned counsel for the petitioner submitted that though in the counter claim the said sum of Rs 6,08,471/- is not mentioned at all, yet the learned arbitrator has awarded this to the respondent. The learned counsel also submitted that the learned arbitrator found that the work of water-proofing carried out subsequently at the behest of the respondent by another contractor was not similar to the work awarded to the claimant.

10. The learned counsel for the respondent, however, submitted that the counter-claim No. 4 was to the extent of approximately Rs 23,00,000/- and only

a sum of Rs 3,76,845/- and the amount already paid of Rs 6,08,471/- was allowed. It is not as if the respondent had not made the claim of the sum of Rs 6,08,471/-. He submitted that the counter-claim No 4 included the sum of Rs 3,76,845/- as well as other items, the total of which was to the extent of approximately Rs 23 lacs. The learned arbitrator has not awarded the amount claimed because he found some dissimilarity in the work but has awarded the amount which has already been paid by the respondent to the petitioner on account of the fact that the work was defective. Therefore, according to the learned counsel for the respondent the award in respect of this work order cannot be faulted. I am in agreement with the submissions made by the respondent in this regard. Consequently, the award in respect of the second work order dated 29.8.1992 cannot be interfered with.

11. With the modifications in respect of the claims qua the first work order dated 16.3.1992 indicated above, this petition is disposed of. The amount which is now payable by the respondent to the petitioner shall be paid within six weeks. In case the amount is not paid within six weeks, then the interest shall be payable thereon at the rate of 12% per annum.

BADAR DURREZ AHMED
(JUDGE)

August 13, 2007
J